No. 45610-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

K.N.Z.; R.L.M., a minor; STEVE ZABRISKIE AND BETH ANNE LOBEY; DEAN MANNING AND SHERRY FAWVER
Appellants,

v.

FRED J. BEEMAN, an individual; DEBBY DILLING AND JERRY DILLING, wife and husband and the marital community composed thereof; and CHRIS BEEMAN, an individual,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This action arises from defendant Fred Beeman's ("Beeman") sexual molestation of plaintiffs K.N.Z. and R.L.M. Plaintiffs brought this action against Beeman as well as his siblings, Debby Dilling ("Dilling") and Chris Beeman ("Chris") (collectively "the siblings"). Plaintiffs contend that, under the unique facts of this case, the siblings owed the plaintiffs a duty to warn plaintiffs of Beeman's proclivities and/or to take steps to protect the plaintiffs from Beeman.

On the siblings' motions to dismiss or for summary judgment, the trial court concluded that the siblings owed no duty to plaintiffs, and therefore dismissed this action as to the siblings. CP 297-302.[1]

The only question presented with this appeal is whether the trial court properly concluded, as a matter of law, that the siblings owed no duty to plaintiffs. Issues regarding the breach of that duty, proximate causation, and damages are not presently at issue. The sole issue concerns the existence of a legal duty.

II. ASSIGNMENT OF ERROR

A. The trial court erred in granting the siblings' motion for summary judgment.

[1] Plaintiffs' claims against Beeman remain pending.

1. Under the facts of this case, the siblings owed plaintiffs a duty to warn plaintiffs of Beeman's sexual proclivities toward minors.

2. Under the facts of this case, the siblings owed plaintiffs a duty to protect the plaintiff minors from Beeman.

3. The facts of this case warrant an extension in the law to recognize that close family members may owe third parties a duty of care to protect minors from the improper and illegal actions of a close family member.

III. STANDARD OF REVIEW

Review of a motion granting or denying summary judgment is "*de novo*". *J.N. v. Bellingham School Dist. No. 501*, 74 Wn. App. 49 (1994); *Schoneman v. Wilson*, 56 Wn. App. 776 (1990).

The defendant siblings bear the burden of establishing that there are no genuine issues of material fact. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171 (1997).

Plaintiffs will ultimately be required to establish a duty, a breach of duty, resulting injury, and proximate cause. *See, e.g., Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807 (2003). For purposes of this appeal, however, the only question is whether there is at least an issue of fact regarding the existence of a duty on the part of the siblings to warn plaintiffs or to take reasonable steps to protect the minor plaintiffs from Beeman.

IV. STATEMENT OF THE CASE

Plaintiff Steve Zabriskie is the father of plaintiff K.N.Z. CP 79. He has been a friend and acquaintance of Beeman since they were in high school. *Id.* Plaintiff Dean Manning is the father of plaintiff R.L.M. CP 81. Mr. Manning met Beeman, as well as his siblings, prior to the time Beeman molested R.L.M. CP 290-91.

Beeman was charged with child molestation in 2001. CP 217-21. Beeman subsequently plead guilty to communicating with a minor for immoral purposes. CP 223-34. None of the plaintiffs knew until much later about the nature of Beeman's crime and conviction. CP 79-83.

Dilling and Chris knew of Beeman's conviction at the time he pled guilty in 2001. CP 34. Neither Dilling nor Chris informed any plaintiff of Beeman's 2001 conviction. Zabriskie did not learn of Beeman's 2001 conviction until 2009. CP 79-80. Manning did not learn of Beeman's

2001 conviction until just before he learned that Beeman had molested R.L.M. CP 82.

In November 2011, Beeman was charged with first degree child molestation of K.N.Z. CP 248. He was also charged with first degree child molestation of R.L.M. *Id.* Beeman was convicted in January 2012 of two counts of indecent liberties. CP 251-62.

At the time Beeman was charged with molestation, Chris told Zabriskie that Chris and Dilling had been sent to Vancouver to keep watch over Beeman. CP 82. Chris also admitted to Zabriskie and Manning that he and Dilling had failed in that regard. *Id.*

Dilling and Chris both socialized with the plaintiffs over the years. CP 81-84. Despite knowing of Beeman's criminal history involving minors, they took no action to warn plaintiffs about Beeman's proclivities toward minors and did nothing to prevent Beeman from having unsupervised contact with the minor plaintiffs. There inaction not only led to Beeman's molestation of R.L.M., but also led Zabriskie not to ask questions of K.N.Z. which would likely have led Zabriskie to learn what Beeman had done to his daughter years earlier. That knowledge would have enabled K.N.Z. and the entire Zabriskie family to receive counseling years ago, thereby avoiding much of the emotional distress they continue to experience. The inaction of the siblings proximately led to Beeman's

molestation of R.L.M. and proximately caused the infliction of emotional distress to the parents of K.N.Z.

IV. LEGAL ARGUMENT

A. The Trial Court Erred in Concluding as a Matter of Law that the Siblings Owed No Duty Whatsoever to the Plaintiffs.

Fred Beeman molested both K.N.Z. and R.L.M. when they were young children. He is serving time in prison for that crime.

Plaintiffs were not the first minor children that Beeman molested. Beeman plead guilty in August 2001 to communicating with a minor for immoral purposes. CP 217-228.

Because of Beeman's sexual proclivities, his siblings were charged with staying with Beeman in Vancouver so as to keep an eye on him. Despite this charge, despite being acquainted and friendly with the parents of K.N.Z. and R.L.M, and despite knowing that the plaintiff parents had young daughters, the siblings took no steps whatsoever to warn the plaintiff parents of Beeman's sexual proclivities. The siblings also took no action to ensure that Beeman was never left alone with the minor plaintiffs. As the result of the siblings' failure to act, Beeman seized the opportunity and sexually molested the minor plaintiffs.

Under these circumstances the law can and should recognize that the siblings owed a legal duty to the plaintiffs to warn them regarding

Beeman's sexual proclivities and/or a duty to take reasonable steps to protect the minor children from Beeman. The trial court erred when it ruled to the contrary. This is not a case of mere inaction, given that the siblings had accepted the charge to keep an eye on Beeman so as to avoid attacks such as those that gave rise to this case.

In *Robb v. City of Seattle*, 176 Wn.2d 427, 429-30 (2013), the Washington Supreme Court held that section 302B of the Restatement (2d) of Torts:

> ...may create an independent duty to protect against the criminal acts of a third party where the actor's own affirmative act creates or exposes another to the recognizable high risk of harm.

This duty can arise "where the risk of third party harm is foreseeable to a reasonable person." *Id.* at 433. In reaching this holding, the court relied on comment E to section 302B, which provides:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; *or where the actor's own affirmative act has created or exposed the other to a recognizable high degree risk of harm through such misconduct, which a reasonable man would take into account*. (Emphasis by court.)

Moreover, the duty can arise where the actor:

> ...may have committed himself to the performance of an undertaking, gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other, or even of a third person...

Here, a reasonable jury could find that defendants had independent duties to take action to prevent or minimize the harm to plaintiffs. They undertook to keep an eye on Beeman for that very purpose. Knowing Beeman was a friend of both families, and knowing that both families had young daughters, defendants said nothing to alert plaintiffs to the hazards and risks Beeman posed to the girls. Instead, they socialized with plaintiffs, giving Beeman additional opportunities to engage in criminally improper acts.

While the *Robb* court ultimately found no liability for the policeman's actions, the facts are distinguishable, and the policy concerns are not relevant to this case. First, the court expressed concern over finding liability whenever the police might take "control of a situation where there is a recognizable high degree of risk of harm that [the policeman] ultimately fails to eliminate. *Id.* at 438. The present situation, in contrast, does not present concerns of ongoing and unlimited scenarios where liability could be found. Instead, this case presents a unique set of facts, where the siblings undertook an affirmative duty to watch Beeman and prevent him from molesting young girls. It is their failure to act

reasonably to perform that duty that exposes the siblings to liability to plaintiffs.

Second, the court found that the police neither created a situation of peril nor increased the risk of harm. *Id.* at 439. Here, however, defendants increased the risk of harm by facilitating Beeman's interaction with R.L.M. They also undertook the duty to watch and monitor Beeman, but failed. Under these circumstances, a jury would be amply justified in finding defendants acted negligently. Plaintiffs should be allowed to present their case to the jury.

The Washington Supreme Court also recognized a duty to guard against the criminal conduct of a third party in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 757 (2013), where the court stated the general rules as follows:

> Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. RESTATEMENT (SECOND) OF TORTS § 281 cmts. c, d (1965). This duty requires actors to avoid exposing another to harm from the foreseeable conduct of a third party. RESTATEMENT § 302. Criminal conduct is generally unforeseeable....
>
> Criminal conduct is, however, not unforeseeable per se.... Recognizing this, we have adopted *Restatement* § 302B, which provides that, in limited circumstances, an actor's duty to act reasonably includes a duty to take steps to guard another against the criminal conduct of a third party.

In *Washburn*, the court found that a duty arose from the simple service of an anti-harassment order. The duty existed because, among other reasons, the court found that the officer serving the anti-harassment order knew or should have known that the recipient might act violently upon receipt of the order. In this case, the siblings similarly knew or should have known that Beeman might sexually assault the minor plaintiffs if he was left alone with them. The siblings could have averted this risk by simply warning the plaintiff parents about Beeman's sexual proclivities. Alternatively, they could have taken steps to ensure that Beeman was not left alone with either of the minor plaintiffs, either at Beeman's home or at the homes of the plaintiffs.

Division I also found a duty to protect a third party from the criminal acts of another in *Parrilla v. King County*, 138 Wn. App. 427 (2007). There, the court imposed a duty of care upon King County where its bus driver parked his bus, exited the bus, and left the engine running with a visibly erratic passenger on board. The passenger took off with the bus, crashing into plaintiff's vehicle. The court noted that there is usually no duty to protect their persons from the criminal conduct of another because such criminal conduct is generally unforeseeable. That principle is not implicated in this case, however, because the siblings knew or should have known that their brother was likely to molest again if he was

left alone with young girls. As in *Parrilla*, considerations of public policy support the imposition of a duty of care under the circumstances of this case.

The existence of a legal duty is also supported by case law such as *Pamela L. v. Farmer*, 112 Cal. App.3d 206 (1980). There, three minor girls were molested by Farmer, who was known to have molested women and children in the past. The court found that Farmer's wife owed a duty to the minor children to protect the children from the sexual proclivities of her husband. The court found that the wife increased the risk of harm to the children by inviting them to her home to swim. Furthermore, the court found that the wife had a "special relationship" with the children because of their age and thus owed them a duty to protect them from harm. *Id.* at 212:

> Finally, even if this case were analyzed in terms of nonliability in the absence of a "special relationship," the necessary special relationship between respondent and plaintiffs in this case can be inferred. The trend has been to expand the list of special relationships which justify imposing liability. Said one court, "the law appears to be heading toward a recognition of the duty to aid or protect in any relation of dependents or mutual dependents." [*Mann v. State of California*, 70 Cal. App.3d 773-780 (1977)]. In this case plaintiffs were dependent upon respondent because plaintiffs are children. Being of tender years they were particularly vulnerable to this sort of misconduct and not fully able to protect themselves against it.

Plaintiffs suggest that the imposition of a duty upon the siblings under the facts of this case is merely an application of existing law, as recognized in *Washburn* and *Parrilla*, *supra*. Even if it were to be considered an extension of the law, courts will not hesitate to find a logical extension of the law where appropriate. *See, e.g., Wilbour v. Gallagher*, 77 Wn.2d 306, 313 (1969).

Restatement (2d) of Torts § 319 (1965) also supports the imposition of a duty under the facts of this case. It provides that:

> One who takes charge of a third person whom he knows or should know is likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

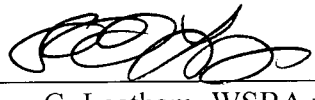
Here, the siblings new of Beeman's prior conviction and of his sexual proclivities. They knew that Beeman was acquainted with the plaintiff parents. They knew that the plaintiff parents had minor daughters. They knew that Beeman's prior conviction was for the molestation of a young girl. Faced with all of this knowledge, the siblings chose not to say a word to the plaintiffs about Beeman and failed to act to prevent Beeman from being alone with the minor plaintiffs. They failed in this regard despite being sent to Vancouver to keep an eye on Beeman. Under these facts, the Court can and should find that the siblings owed the plaintiffs a duty of reasonable care.

VI. CONCLUSION

The trial court erred in granting the siblings' motion for summary judgment. This Court should find that the siblings owed the plaintiffs a duty of reasonable care under the facts and circumstances of this case. This matter should be remanded to the trial court for trial on the issues of breach of duty, proximate cause, and damages.

DATED this 16 day of June, 2014.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



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